74-1087

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974

NO. A-582

ANDREW JACKSON ROSS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERITIORARI TO THE SUPREME COURT OF THE UNITED STATES

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ANDREW JACKSON ROSS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERITIORARI TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas entered in this case on September 30, 1974.

CITATION TO OPINIONS BELOW

Ross v. State of Arkansas, 257 Ark. 44, 514 S.W. 2d 409 (1974).

JURISDICTION

The jurisdiction of this Court is invoked by:

1. Opinion affirming appellant's conviction entered by the Supreme Court of Arkansas on September 30, 1974.
2. Order denying rehearing entered November 4, 1974.
3. Order entered by Associate Justice Harry A. Blackmun on January 16, 1975, extending time to file Petition for Writ of Certiorari to March 4, 1975.
4. 28 U.S.C.A. §1257 (3).

QUESTIONS PRESENTED

I.

IS A CONFESSION, WHICH IS MADE PURSUANT TO THE PROCESS OF "PLEA-BARGAINING", VOLUNTARILY GIVEN AND ADMISSIBLE EVIDENCE?

CONSTITUTIONAL PROVISIONS

I. Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The appellant was charged by Information with embezzling funds in his custody as Treasurer of Pope County, Arkansas. When originally charged, the petitioner was represented by the Honorable Robert Hays Williams and on behalf of the appellant Mr. Williams negotiated with the Prosecuting Attorney under the system we now refer to as "plea bargaining." An agreement was reached whereby the Prosecuting Attorney would recommend to the Court that the appellant be sentenced to fifteen (15) years in the State Penitentiary with ten (10) years suspended, upon condition that petitioner enter a plea of guilty.

Subsequent to this agreement, petitioner gave a statement to the Prosecuting Attorney concerning the alleged acts of embezzlement. This statement was taken in the presence of petitioner's attorney, Mr. Williams, and was given as a direct result of the agreement with the Prosecuting Attorney, but was not an express condition imposed by the arrangement between petitioner and the Prosecuting Attorney. Petitioner later withdrew his plea of guilty; a *Denno* hearing was held wherein the trial judge found this statement to have been voluntarily given. Trial was commenced on August 27, 1973, wherein petitioner's statement was received into evidence, and the jury returned a verdict of guilty of embezzling funds and fixed petitioner's punishment at twenty-one years in the State Penitentiary.

An appeal was duly filed to the Supreme Court of Arkansas wherein the question of the admissibility of petitioner's statement was duly raised by petitioner.

ARGUMENT FOR ALLOWING THE WRIT

IS A CONFESSION, WHICH IS MADE PURSUANT TO THE PROCESS OF "PLEA-BARGAINING", VOLUNTARILY GIVEN AND ADMISSIBLE EVIDENCE?

In *Santobello v. New York*, 404 U.S. 257 (1971), this Court recognized the need and desire of the process of "plea-bargaining" as a necessary adjunct to the disposition of criminal cases. The question presented herein relates to how this process is to be construed in relation to an accused's right against self-incrimination. The parameters of admissible evidence obtained pursuant to such a process is a question which must be resolved by the highest Court of the nation.

In 59 ALR 3d 441 (1973), Admissibility of Defense Plea Bargaining, is found a collection of cases from various states which shows that the question presented herein has been given widely different interpretations. Some state courts allow into evidence statements and communications of accused parties on the theory that they are not technically coerced and therefore if otherwise "voluntarily" given are admissible. On the other hand, some state courts have held upon various theories that any communications pursuant to or subsequent to a "plea-bargained" guilty plea are inadmissible evidence. This Court should grant petitioner herein his Writ of Certiorari to determine the extent that the Constitutional guarantees of petitioner's Fifth Amendment right against self-incrimination protects the admission of such statements.

In *People v. Jones* (Ill. App.), 291 N.E. 2d 305, a confession given after a plea of guilty had been entered by the accused was held inadmissible because it was given upon the condition that the accused testify on behalf of the state against another defendant and was therefore not

"voluntarily given." In the case at bar, the Arkansas Supreme Court distinguished *Jones* on the grounds that in *Jones,* defense counsel was not present during the admismission and that the agreement to the lesser sentence was expressly conditioned upon the defendant's admission. In the case at bar, petitioner's attorney was present during the confession and there was not an express condition that petitioner give a statement in order to acquire the Prosecuting Attorney's recommendation of a lesser sentence. One question for this Court is whether these are valid distinctions under the Fifth Amendment. That is, does the Fifth Amendment as a matter of law nullify the voluntariness of an admission when given under a promise of a lenient sentence. Whether or not the giving of the confession is an express condition precedent to recommending a lesser sentence.

In *Moulder v. State,* (1972 Ind. App.) 289 N.E. 2d 522, 59 A.L.R. 3rd 432, the Court held that all communications during "plea-bargaining" are privileged communications and therefore inadmissible. A second question for this Court is whether the Fifth Amendment to our Constitution creates such a privilege.

Petitioner contends that admissions given pursuant to and subsequent to a plea of guilty in exchange for a recommendation of a lesser sentence should come within the definition of "psychological pressure" given in *Townsend v. Sain,* 372 U.S. 293, 307, and therefore cannot be "voluntarily" given, and that all such communications should be privileged statements coming within the protection of the Fifth Amendment. This Court should grant Certiorari herein to define the limits of evidence which is admissible when given during the "plea-bargaining" process approved in *Santobello v. New York, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

By: JEFF MOBLEY

MOBLEY AND SMITH
Attorneys at Law
Russellville, Arkansas

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three (3) copies of the foregoing have been furnished by mail to Jim Guy Tucker, Attorney General, Justice Building, Little Rock, Arkansas 72201.

/s/ JEFF MOBLEY

Appendix

SUPREME COURT OF ARKANSAS

No. CR-74-35

ANDREW JACKSON ROSS ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

OPINION DELIVERED SEPTEMBER 30, 1974

APPEAL FROM JOHNSON COUNTY CIRCUIT COURT

HONORABLE W. H. ENFIELD, *Judge, On Assignment*

AFFIRMED

CARLETON HARRIS, *Chief Justice*

Andrew Jackson Ross, in 1971, the Treasurer of Pope County, Arkansas, was charged with the crime of embezzlement, the Information alleging 86 transactions of embezzlement of public funds in his custody and possession, it being alleged that the embezzlement occurred between January 5, 1971 and December 10, 1971. On trial, the jury found Ross guilty and his punishment was fixed at 21 years imprisonment in the Arkansas Department of Correction. From the judgment so entered, Ross brings this appeal. For reversal, four points are relied upon, which we proceed to discuss.

It is first asserted that a confession given by appellant was not freely and voluntarily made and was therefore inadmissible, this contention being based on the premise that the statement was given in consideration of a promise of leniency. We do not agree. Prior to the introduction of

appellant's statement into evidence, a *Denno*[1] hearing was held in chambers on motion of the State, and at such hearing the Sheriff of the County and Robert H. Williams, original counsel[2] employed by Ross, testified, the latter being called by appellant. Williams testified that he had earlier entered into plea bargaining negotiations with the prosecuting attorney and had received assurances that that official would recommend to the court a 15 year sentence, 10 years being suspended, if Ross should plead guilty to the charges. The attorney testified that he gave this information to his client and was advised by the latter that the agreement was acceptable, and what Ross "wanted to do." Williams very clearly stated that the agreement was not contingent in any manner upon Ross agreeing to give a confession and, in fact, the lawyer testified that the agreement on the recommendation of time to be served was made before the prosecuting attorney asked for any statement. These were the only witnesses who testified in chambers and the court held the statement to be voluntarily made, commenting further to the effect that in instances where agreements had been reached between the State and defense, following plea bargaining, and a statement was subsequently given, such statement, under appellant's theory, no matter how voluntary, would be inadmissible if a defendant decided to retract such confession. In the trial itself, Williams reiterated the testimony given in chambers and further testified that the statement was taken in his office. Mr. Williams, a capable and experienced attorney, was present the entire time and thus was in a position to advise his client during the questioning. The

[1]**Jackson v. Denno**, 378 U.S. 368, 84 S. Ct. 1774.

[2]While not entirely clear, the record indicates that Williams was the attorney for the Bank of Russellville, one of the depositories for County funds, and this apparently occasioned his withdrawal.

attorney also testified that Ross was entirely willing to make a statement. Appellant relies upon *People v. Jones* (Ill. App.), 291 N.E. 2d 305, where the court held a confession to be inadmissible, such confession being rendered after an agreement had been reached by the State and defense during plea bargaining. We do not consider the case applicable to the fact situation at hand. In *Jones*, the testimony on the part of the defendant (which was sharply disputed) reflected that the promise of leniency was conditioned upon that defendant testifying on behalf of the State against another defendant; Jones was told that he could get 40 to 50 years if he went to trial. The opinion further reflects that the statement was taken by an Assistant State's Attorney in his office, counsel for defendant not being present. It is at once apparent that there is but little, if any, similarity in that case and the one at hand. In addition to the differences in the circumstances surrounding the statement here in issue, it will also be noted that Ross himself does not contend that the agreement reached between the prosecuting attorney and his counsel had any bearing on his willingness to give the statement. Not a single witness testified to such a fact. In fact, appellant admits in his brief that the confession was not given in consideration of the agreement between the State and defense counsel, appellant stating:

> "The testimony reflects that an agreement had been reached between the appellant's attorney and the Prosecuting Attorney and the statement given by the appellant was purely for whatever extra-judicial purposes the Prosecuting Attorney might have had."

It is true that the attorney said that he would not have permitted the statement to have been made except for the

agreement which had already been consummated, but this would seem to be the obvious view of an experienced attorney, and certainly has nothing to do with the voluntariness of the statement. For that matter, in *Jones*, the court held that the issue of voluntariness was a question for the trial court to determine and stated that a reviewing court will not disturb such a finding unless there is a showing that it is contrary to the manifest weight of the evidence.[3]

tion that the confession was inadmissible for the reason that Ross, during interrogation, indicated that he wished to answer no more questions. We find no merit in this contention. In the first place, this issue was not raised in the trial court. The record reflects the following colloquy between the court and defense counsel, as follows:

"THE COURT:

Do I understand you to say that there has been a denial of constitutional rights in this case?

MR. MURPHY:

No. No. If this is admitted it will be. This is not a voluntary statement.

THE COURT:

I see.

MR. MURPHY:

Because *it was given under a benefit.*" [Our emphasis].

This objection, which has already been thoroughly discussed, was the only objection made to the admission of the confession. It might be added that Ross never declined to answer questions, and indicated only once that he was

[3]In **Jones**, the trial court held the statement to be involuntary.

Appellant's brief also devotes a paragraph to an asser-

tired. Certainly, the finding of the Pope County Circuit Court that the confession was voluntarily made is not against the weight of the evidence.

It is next urged that the appellant lacked the mental capacity to voluntarily waive his constitutional rights, and that this lack of mental capacity was made known to the State at the time the confession was obtained. Let it be said at the outset that no objection along this line was made to the trial court at all. As previously stated, the *only* objection to this confession made to the circuit court was that it was the result of coercion, i.e., made on the basis of the understanding that Ross would receive a lesser sentence. Under our procedure and cases, we do not consider arguments raised for the first time in this court on appeal. See *The Travelers Insurance Company v. McCluskey*, 252 Ark. 1045, 483 S.W. 2d 179. This actually could preclude consideration of the point, but inasmuch as this is a case of public interest, it might be said that even considering the point to be properly raised here, same is found to be without merit. Appellant's argument is based on the confession itself and thus is totally dependent upon the statements of Ross. Briefly stated, he related the disorders that he had been told he was suffering from by his doctor. He mentioned shock treatments at sometime in the past, and stated that the doctor, during his most recent confinement, thought he (Ross) was suffering from a brain tumor (but the tests showed normal); the doctor subsequently found a small cancer in his stomach. In subsequent testimony which was offered by the defense in an effort to establish insanity, Dr. Stephen Finch testified that Ross was suffering from chronic brain syndrome, a condition where brain cells die because of lack of blood supply. The doctor said that Ross suffered from a memory loss, more particularly of recent events, and that he would say that

appellant's brain had deteriorated because of arteriosclerosis, to the age of an 80-year-old man. There was other medical testimony on both sides, but no testimony by any physician was offered that Ross was mentally incompetent to make the statement. The testimony of appellant's physicians was simply an effort to convince the jury that Ross was not guilty by reason of insanity.

The basis of the allegation that a lack of mental capacity was made known to the State at the time the confession was obtained is predicated simply upon a few statements that appellant made to the prosecuting attorney during interrogation. For one, when asked about the alleged giving of money to his secretary for extra work, Ross replied that he "wouldn't be capable of remembering what happened back then because I underwent shock treatments and it has kinda affected my memory a little bit." For another, appellant stated that his doctor had advised him that he would not be able to be present on the date set for trial and should not even engage in telephone conversations. It is argued that after these observations, by Ross, the prosecuting attorney should have ceased his questioning, but that instead, "Incredibly the inquisition continued for quite some length of time." We cannot agree that the matters mentioned reflect a lack of mental capacity to give the statement. Appellant appeared fully aware of the questions being propounded, and it is interesting to note that when asked if he had converted to his own use about $295,040.61, appellant responded, " '94, I believe." He also explained that at the end of each month, to make his bank statement balance with his books, he "would take from one bank and put in the other." When asked how much he would take from the bank[4], he answered, "Just whatever

[4]The treasurer banked with the Bank of Russellville and the Peoples Bank.

amount I used that month I would take from the other bank and then before the end of the month — at the end of the month I would put that back." Let it also be remembered that his attorney was present with him for the purpose of seeing that appellant's rights were not violated. The interrogation was conducted in a conversational manner and there was no harassment or intimidation of the witness. We find no merit in appellant's second point.

It is next contended that the introduction of evidence of alleged embezzlement occurring prior to 1971, and for which no criminal charge had been filed, was prejudicial and requires a reversal. Wendell Riddell, an auditor for the Division of Local Affairs Audit, employed by the Audit Division for about 12 years, testified that he recovered 85 checks totaling $41,570.00 for the year 1971 (this was the amount set out in the Information filed against Ross), and he asked appellant if he objected to telling the amount that had been taken. Ross responded that the amount of the shortage would be close to $300,000.00. Subsequently, appellant, according to the auditor, stated that they would have to go back over a period of years to determine the proper amount. The auditor testified that the total shortage amounted to $295,040.61. Counsel for appellant objected to "anything which happened before 1971," such objection being overruled, the court holding it admissible as testimony concerning method of operations. Counsel never did state why he objected to testimony concerning shortages before 1971, except that on one occasion he said that he objected "if this is trying to get anything in in the form of a confession or admission." Subsequently, counsel asked that the testimony be stricken, stating, "The Information is for $41,000." We find no merit in the contention. While evidence of other offenses is not admissible where the only

purpose is to portray a defendant as a person of bad character, or addicted to crime, such evidence is properly received, *inter alia*, to show mode or method of operations, common scheme or plan, design, habits, practices, etc. See *Baker v. State*, 4 Ark. 56; *Cain v. State*, 149 Ark. 616, 233 S.W. 779; and *Tolbert v. State*, 244 Ark. 1067, 428 S.W. 2d 264. See also 22A CJS Criminal Law §688 where it stated:

> "Proper evidence which proves or tends to prove a common scheme, plan, design, or system of criminal action will not be excluded because it also shows the commission of another crime by accused. Broadly speaking, evidence of other crimes than that charged is competent and admissible when it tends to establish a common scheme, plan, system, design, or course of conduct."

It might be added that appellant requested no instruction advising the jury that the testimony was admissible only for the purposes herein mentioned.

Finally, it is asserted that the trial court erred in refusing to declare a mistrial when the appellant discovered a member of the jury was a justice of the peace. Formerly, by statute (Ark. Stat. Ann. §39-230 [Repl. 1962]), a justice of the peace could be peremptorily challenged, but such statute was repealed by Section 30 of Act 568 of 1969. Of course, there was no statutory disqualification even to begin with, and the juror was not challenged on *voir dire*; nor is there any indication that his presence as a member of the jury prejudiced the rights of the appellant. Under these circumstances, there was no abuse of discretion in refusing to declare a mistrial.

Finding no reversible error, the judgment is affirmed.

It is so ordered.

In The Supreme Court of Arkansas

ANDREW JACKSON ROSS ..... *Plaintiff*

VS. No. CR-74-35

STATE OF ARKANSAS ..... *Defendant*

PETITION FOR REHEARING

The petitioner, by his attorneys, respectfully moves the Court for a rehearing in this matter and for cause states:

It is respectfully submitted that this Court committed error in allowing the submission of the appellant's confession in the light of the fact that the appellant was physically and mentally disabled to waive his constitutional rights and that the Court has completely overlooked the testimony of Dr. Stephen Finch to the effect that his arteriosclerosis had depleted his brain to the age of an eighty-year-old man.

While many eighty-year-old men are lucid, the doctor's testimony was to the effect that the appellant was mentally and physically incapable of admitting or confessing to anything.

Apparently, without contradiction, the doctor stated that the appellant suffered from a memory loss.

Because of the foregoing, it is strongly urged that the Court reconsider its opinion and that the Court should remand the matter if for no other reason to the Circuit Court for a further determination of the mental and physical capacity of the appellant.

/s/ MURPHY, CARLISLE & TAYLOR
Attorneys for Appellant

FILED: Oct. 17, 1974; Jimmy H. Hawkins, Clerk.

STATE OF ARKANSAS)
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 7th day, being the first Monday of October, A.D. 1974, amongs others were the following proceedings, to-wit:

On the 4th day of November, A.D. 1974, a day of said term

ANDREW JACKSON ROSS ..... *Appellant*

vs. No. CR-74-35

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM

JOHNSON CIRCUIT COURT

Petition for rehearing denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 17th day of December, A.D. 1974.

/s/ JIMMY H. HAWKINS, Clerk

Supreme Court Of The United States

NO. A-582

ANDREW JACKSON ROSS, *Petitioner*

v.

ARKANSAS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 4, 1975.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 16th day of January, 1975.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. A-582

ANDREW JACKSON ROSS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of Supreme Court of the State of Arkansas is reported at *Ross* v. *State of Arkansas*, 257 Ark. 44, 514 S.W. 2d 409 (1974).

JURISDICTION

The requirements for jurisdiction are adequately set forth in the Petition.

QUESTION PRESENTED

WHETHER A CONFESSION MADE SUBSEQUENT TO AN AGREED UPON PLEA BARGAIN IS VOLUNTARILY MADE AND ADMISSIBLE IN EVIDENCE.

STATEMENT

This criminal litigation arose from the allegation of petitioner's commission of the crime of embezzlement. The alleged crime [Eighty-six (86) counts of embezzlement of funds in petitioner's custody] occurred while petitioner was Treasurer of Pope County, Arkansas. After having been charged, the petitioner, through his attorney, arrived at an acceptable plea bargain with the Prosecuting Attorney whereby petitioner would plea guilty and the Prosecuting Attorney would recommend to the Court that petitioner be sentenced to fifteen (15) years in the State Penitentiary less ten (10) years suspended. The plea bargain was a fait accompli when petitioner with full assistance of his counsel and in his counsel's office gave a statement, confession of guilt, to the Prosecuting Attorney. The confession given was not made contingent upon the plea bargain remaining viable. Petitioner later withdrew his plea of guilty and a trial date was set. The trial court held the required *Denno* hearing and the confession was held to have been voluntarily given without promises of leniency or threats of coercion. Trial was held on August 27, 1973, wherein petitioner's confession was admitted in evidence and the jury found petitioner guilty and returned a sentence of twenty-one (21) years in the State Penitentiary. Upon appeal to the Supreme Court of Arkansas the issue of the voluntariness of petitioner's confession and its admission in evidence was again raised and the trial court's findings were affirmed. Petitioner's petition for rehearing was subsequently denied.

ARGUMENT

The issue in the case at bar is narrowly drawn and the judicial review has been sufficient to dispose of the case so as to not warrant review by this court on certiorari. The case does not approach the issue of the giving of a confession in exchange for a recommendation of lenient sentence by the Prosecuting Attorney, but, rather, resolves itself to a question of voluntariness of a confession given subsequent to an agreed upon plea bargain in circumstances where the full panoply of appellant's constitutional rights were protected. The withdrawal of the guilty plea after said confession does not vitiate the voluntariness thereof.

I.

The petitioner's confession was found to have been freely and voluntarily given by the trial court pursuant to a *Denno* hearing and written findings therefrom as well as by the Arkansas Supreme Court in appellate review. These findings were made on the basis of the totality of the circumstances. *Boulden* v. *Holman*, 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969); *Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1344, 16 L. Ed. 2d 360 (1966); *Harris* v. *State*, 244 Ark. 314, 425 S.W. 2d 293 (1968). In the *Denno* hearing, *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and as required by statute, Ark. Stat. Ann. § 43-2105 (Supp. 1973), the trial court found from a preponderance of the evidence that there were not promises of leniency nor any manner of coercion that vitiated the voluntariness of the confession.

Petitioner, however, construes the confession as violative of his Fifth Amendment Right under the United States Constitu-

tion not to be a witness against himself, i.e. the right against self-incrimination. This right, however, is subject to being waived under ". . . procedural safeguards effective to secure the privilege against self-incrimination," and ". . . to insure that the statements were truly the product of free choice." *Miranda* v. *Arizona*, 384 U.S. 436, 444, 457, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). There is no question that petitioner was appraised of these required *Miranda* warnings. Further, the confession was made in the office of petitioner's counsel and with his counsel present which negates any claim of overbearing "custodial interrogation" or of an "incommunicado police-dominated atmosphere", which were situations found undesirable by this Court. *Miranda*, supra, at 455. The petitioner, also, states that the giving of the confession ". . . was not an express condition imposed by the arrangement between petitioner and the Prosecuting Attorney." (Appellant's statement of the case, p. 3) The petitioner characterizes the confession as a "direct result" of the plea bargain, and analogously as an implied condition on the plea bargain arrangement. There is no evidence to support such an assertion and the circumstances do not give rise to such reasoning. The plea bargain was a fait accompli; the recommendation of sentence was not contingent upon petitioner's making a statement of any kind and the recommendation would have been made without the statement being made. The confession was a voluntary statement by the petitioner.

The petitioner contends that admissions given subsequent to a plea bargain agreement cannot be voluntarily given and are inadmissible. Respondent readily concedes that communications and negotiations made pursuant to a plea bargain are inadmissible, but specifically denies that any comparable rule should exist where the communication is made without any

relation to the plea bargain. In support of his contention petitioner relies upon *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), *People* v. *Jones*, 291 N.E. 2d 305 (Ill. App. 1972), *Moulder* v. *State*, 289 N.E. 2d 522 (Ind. App. 1972), and *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). A cursory reading of *Santobello*, supra, discloses its non-applicability to the case at bar as here petitioner withdrew his plea of guilty before trial thereby breaching the plea bargain and voiding the commitment of the Prosecutor to recommend a sentence. There was no failure by the State to keep a commitment arrived at pursuant to plea bargaining. The *Jones*, case, supra, is distinguishable on the facts as was done by the Arkansas Supreme Court in the case at bar. In *Jones*, supra, the recommendation of a lesser sentence was expressly conditioned upon the admission of guilt by the defendant, and the defense counsel was not present at the time of the confession. These elements have been demonstrated, above, as not applicable to the case at bar. The *Moulder* case, supra, is likewise distinguishable from this case in that it dealt with a situation where the defendant did not have the benefit of counsel during the giving of the inculpatory statement, and the statement was in regard to the plea bargain, not separate and distinct as here. The analogy that petitioner makes to the "psychological pressure" found present in *Townsend*, supra, is without merit in this case. In *Townsend*, supra, the defendant had undergone lengthy interrogation at the police station, was under the influence of a "truth serum", scopolamine, and did not have counsel present when the confession was elicited. Petitioner does not allege that he was under the influence of any drug or medication and the other elements of coercion are demonstrably not in evidence in this case.

Respondent, therefore, asserts that petitioner's con-

stitutional rights were adequately safeguarded, that the totality of the circumstances deny any suggestion of promises or threats in the giving of the confession, that the confession was voluntary and that it was properly received in evidence. The confession was not compelled in any way, the petitioner did not have to make a confession in order to retain the benefit of the plea bargain, and the voluntary withdrawal of the guilty plea does not alter the sufficiency of the procedural safeguards so as to vitiate the voluntariness of the confession. In short, nothing more could have been done to insure the voluntariness of the confession and petitioner cannot in retrospect attempt to use an unrelated plea bargain as a shield to the admission of the statement in evidence merely because petitioner improvidently changed his plea to not guilty and received the maximum sentence for the offense.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES GUY TUCKER, JR.
Attorney General
State of Arkansas

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CERTIFICATE OF SERVICE

I, Gary Isbell, Assistant Attorney General, do hereby certify that I have forwarded two (2) copies of the Brief for Respondent in Opposition to Mr. Jeff Mobley, 128 E. Main, Russellville, Arkansas 72801, by placing same in the United States Mail, postage prepaid this 2nd day of April, 1975.

/s/ GARY ISBELL
GARY ISBELL
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